85-947 (1)

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

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THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, Petitioner,

v.

RICHARD MANECKE, JULIA MANECKE, LAUREN MANECKE, Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

o

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QUESTION PRESENTED FOR REVIEW

Are the parents of a handicapped child entitled to bring an action for the recovery of money damages, (mental anguish, etc.), attorney's fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988, based upon a claim that the School Board denied them "due process" by failing to provide and complete an administrative due process hearing within 45 days as "required" by 34 C.F.R. §300.512, which implements the Education of the Handicapped Act (EHA), 20 U.S.C. §1400, et seq., or are the remedies provided by the EHA the "exclusive avenue" to assert a claim to a free appropriate public education pursuant to the holding in *Smith v. Robinson*, — U.S. —, 104 S.Ct. 1357, 82 L.Ed. 2d 746 (1984)?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding before the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit.

Richard Manecke, Julia Manecke, and Lauren Manecke were the plaintiffs before the United States District Court and appellants before the Eleventh Circuit Court of Appeal. The School Board of Pinellas County, Florida, was the defendant in the United States District Court and appellee in the United States Eleventh Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The School Board of Pinellas County, Florida, by and through its undersigned Attorney, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eleventh Circuit, entered on June 11, 1985, in this case.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 762 F.2d 912 (11th Cir. 1985). The opinion is set forth in the Appendix at page App. 1a — 23a.

The opinion of the United States District Court for the Middle District of Florida, Tampa Division, is reported at 553 F.Supp. 785 (M.D.Fla. 1982). The opinion is set forth in the Appendix at page App. 24a — 30a.

A second opinion, dated June 28, 1984, was rendered by the United States District Court for the Middle District of Florida, Tampa Division, but was not published. That opinion is set forth at App. 31a — 39a.

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JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was filed on June 11, 1985. On June 28, 1985, appellants filed a Petition for Rehearing. On July 11, 1985, appellee filed a Petition for Hearing En Banc and/or for Rehearing. On August 5, 1985, the United States Court of Appeals for the Eleventh Circuit denied appellant's Petition for Rehearing and the appellee's Petition for Hearing En Banc and for Rehearing. The United States Court of Appeals for the Eleventh Circuit issued its Mandate on August 20, 1985. A timely Motion for Extension of Time Within Which to File Petition for Certiorari was filed on October 23, 1985, and an Order was issued on October 24, 1985, granting said Motion extending the time to file said Petition to and including December 3, 1985.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

* * *

42 U.S.C. §1983

Section § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

34 C.F.R. §300.512

Section §300.512 Timeliness and convenience of hearings and reviews

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A Copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than

30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

STATEMENT OF THE CASE

Richard B. and Julia W. Manecke are the parents of Lauren Manecke, who was a student in the public schools of Pinellas County, Florida. Lauren was enrolled in the regular school program at Dixie Hollins High School, but received supplemental special education classes. At all times relevant Lauren was an adult (age 19) who, at birth, suffered minimal brain damage.

Beginning in February of 1976, Lauren received medical attention from Mary Andriola, M.D., for a condition known as petit mal (epilepsy). The condition was controlled by medication. Lauren also suffered a minimal emotional handicap. Lauren's physical and emotional handicaps were not so severe as to prevent her from attending and performing reasonably well in the regular school program. In February 1979, Lauren was seventeen years old when she left school with a 32 year old married man with whom she had a sexual relationship for a period of six days. Prior to and after that incident, Lauren acted in a sexually provocative manner. Lauren did not restrict her sexual activities in any manner and even attempted to entice her father and brothers.

After the above-described episode, Lauren's parents withdrew her from high school and enrolled her in a private school. Also, she began treatment with John Mann, M.D., an adolescent psychiatrist. Dr. Mann and Mrs. Manecke testified that in 1979 and 1980, Lauren's presence in the home was extremely disruptive to the family.

Partially as a consequence of her promiscuity, Lauren's relationship with her mother was very strained, as was her relationship with the other family members — in particular, her younger brother. The difficulties in the Manecke household reached such a desperate level that, during this period, Lauren's younger brother was sent to a private residential school in order to relieve the tension between brother and sister.

To alleviate her parents anxieties, in the summer of 1979, at her parents' expense, Lauren was sent to a residential summer camp in Pennsylvania. In addition, on July 24, 1979, by letter, Mrs. Manecke requested the School Board to enroll Lauren in a special education school. The school officials agreed to the placement and Lauren began attending classes at Nina Harris School for Exceptional Children ("Nina Harris") in September of 1979. After school commenced, an Individual Education Plan (I.E.P.) was developed with the assistance of her parents and Dr. Mann. The I.E.P. staffing committee classified Lauren as emotionally and physically handicapped.

Nina Harris School was highly regarded by both the Maneckes and Dr. Mann. The school offered a variety of individual academic and social programs for exceptional students. While attending Nina Harris, Lauren did not exhibit any behavioral or emotional difficulties, nor did her teachers observe any epileptic seizures. She was making adequate academic progress and appeared to be well-behaved; she even participated in a number of extra-curricular activities.

During September and October of 1979, the Maneckes began requesting information about a residential-type facility outside of Pinellas County because of Lauren's poor relations at home. In spite of Lauren's apparent adjustment at Nina Harris, the quality of life at her home continued to deteriorate. Dr. Andriola advised Lauren's parents to place her into a supportive program for psychotherapy to help temper the emotions caused by Lauren's home life. The Maneckes rejected Dr. Andriola's advice.

In November of 1979, the Maneckes specifically requested information from school officials about the Bancroft School in New Jersey. They complied with the Maneckes' request and obtained and provided the information about that private school.

Shortly thereafter (December 19, 1979), Mrs. Manecke addressed a typewritten letter to Dr. Howard Hinesley, Assistant Superintendent for Exceptional Student Education, expressing her concern over Lauren's emotionally charged behavior, and expressed her desire to place Lauren in an out-of-state facility — not because of her educational needs, but because of the increasing deterioration of the Maneckes' home life. Along with the typewritten letter, Mrs. Manecke attached a handwritten note requesting a "due process hearing". Mrs. Manecke sent copies of the letter to prominent Florida government figures. Dr. Hinesley received Mrs. Manecke's letter in January 1980, after the school system reopened following the winter holidays. When he received the letter, he called Mrs. Manecke, who voiced frustration about Lauren's sexual behavior.

On January 4, 1980, Dr. Hinesley acknowledged Mrs. Manecke's typewritten letter and sent copies of the letter to the school district's attorney. The handwritten note apparently did not accompany the typewritten letter to the School Board Attorney's files. On the copy of Dr. Hinesley's letter, the school attorney's secretary wrote, "If they don't set a hearing, toss." It was Dr. Hinesley's assumption that the attorney's office would automatically handle the request for a due process hearing. It was the first time the school administration had received a request for a "due process hearing," and they did not have a standardized procedure for processing a hearing request. The Maneckes made no attempt to expedite the hearing process or contact the school officials about the requested hearing.

Mrs. Manecke sent a copy of her letter to the Florida Commissioner of Education. Diane Wells, an administrator with the Commissioner's office, instructed Dr. Hinesley to mediate Mrs. Manecke's concerns rather than conducting a due process hearing. As a consequence, about 41 days after receipt of Mrs. Manecke's letter, Dr. Hinesley arranged a meeting with the Maneckes (February 13, 1980). The Maneckes advised the school officials that Lauren was uncontrollable at home, and as a result they were seeking private residential placement for her. The school officials expressed their opinion that Lauren was receiving an adequate education at Nina Harris and, therefore, they would not recommend that the Board provide a private residential placement even though they acted in a concerned fashion for the Maneckes throughout the mediation

process. The Maneckes then suggested that the school officials meet with Drs. Andriola and Mann.

On March 12, 1980, approximately 68 days after receipt of the December 19th letter, a meeting was held with the doctors, the Maneckes and the school officials, in order to discuss Lauren's current and future placement. Both physicians agreed that Nina Harris provided an appropriate educational placement for Lauren but, again because of her home environment, they recommended placement in a private residential facility. Dr. Hinesley did not waiver in his belief that the Board was not required to pay for Lauren's placement in a residential facility, and ended the meeting by promising to furnish the Maneckes with information concerning residential facilities, but made it known that such placement would be at the Maneckes' expense, and not that of the School Board. On the same day, Dr. Andriola wrote to the Devereux School, a private school in Texas, indicating that Lauren's seizures were under excellent control. This was done at the suggestion of the Maneckes, because they had made inquiry about placement there.

Immediately after the March 12th meeting, the Maneckes were contacted by the Devereux School. They were told that Devereux had a vacancy which Lauren could fill if she were promptly enrolled. The Maneckes accepted Devereux School's terms without consulting or informing the school officials that she was being placed there.

Mrs. Manecke's December 19th letter also reached the United States Office of Civil Rights (OCR). She complained that the school system had unlawfully refused to place Lauren in a residential facility because of her age. That agency instituted an age discrimination investigation and mediation efforts.

As a result of OCR's mediation efforts, the Board's attorney, in July of 1980, sent Lauren's parents a "due process" form. Although the Maneckes received the form, it was never returned to the attorney, even after the Board's attorney called and asked Mrs. Manecke to sign it and return it to his office. Because the Maneckes failed to sign the form, a due process hearing was not scheduled with the Florida Division of Administrative Hearings (DOAH).

OCR dropped the age discrimination complaint in December of 1980, and ordered the parties to hold a due process hearing. The DOAH hearing was scheduled for January 26, 1981, but before the

hearing could be held, the Maneckes contacted the DOAH and cancelled the hearing.

Lauren was enrolled in Devereux from March 21, 1980, until December 31, 1981, when she graduated. Upon her arrival at Devereux, she contracted mononucleosis and did not attend any academic classes during the remainder of the 1979-80 Devereux school year. After her treating physician (at Devereux) released her, Lauren attended the summer enrichment program (non-academic) during June, July, and August. Therefore, she did not commence her academic classes until September of 1980. The academic and anecdotal reports from both Devereux and Nina Harris revealed that Devereux' academic courses offered essentially the same program as Nina Harris. Lauren's academic and social progress at Devereux was similar to her progress at Nina Harris.

Shortly after canceling the scheduled due process hearing, the Maneckes filed a two-count amended complaint, brought under §504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 and the Civil Rights Act of 1871, 42 U.S.C. §1983. They alleged the School Board failed to provide them with a due process hearing within 45 days after Mrs. Manecke's request, in violation of federal regulation (see 34 C.F.R. §300.512), on the issue of whether Lauren was receiving a "free appropriate public education". Since they claimed that the school administration did not provide the hearing within the required time, they "unilaterally transferred" their daughter to a private residential facility. However, the Maneckes failed to maintain the "status quo" as required by 20 U.S.C. §1415(e)(3). App. 44a. The School Board moved to dismiss the amended complaint on the grounds that (1) §504 did not authorize damages to a private litigant, (2) waiver, and (3) that §1983 was an "end run" around the administrative procedures established in the EHA. It also defended on the ground that the Maneckes had not exhausted their administrative remedies.

The district court dismissed both the §504 and §1983 counts of the amended complaint. The §1983 count was dismissed on the basis of *Maine v. Thiboutot*, 448 U.S. 1 (1980), *Pennhurst State School & Hospital v. Haldeman*, 451 U.S. 1 (1981), and *Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981). App. 29a — 30a.

The Maneckes amended their complaint, at the Court's suggestion, stating a claim based solely on the EHA. After a two-day bench trial the district court dismissed the second amended complaint on the basis that the complaint did not meet two exceptional circumstances which would permit damages and that is the defendant: (1) acted in bad faith in failing to comply with the procedural provision of § 615 of EHA in an egregious fashion or (2) the student's health was in danger. *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), and *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983). App. 36a. From that dismissal plaintiff appealed to the Eleventh Circuit Court of Appeals which reversed the district court's dismissal of the §1983 action. App. 15a. It is that decision which petitioner respectfully request this Court to review.

REASONS FOR GRANTING THE WRIT

I

This case involves the appropriateness of a public education provided to a handicapped child (age 19). The remedial scheme provided by the "Education of the Handicapped Act" (hereinafter EHA), 20 U.S.C. §1400 *et seq.* was intended to be "exclusive" and a "due process" claim filed pursuant to 42 U.S.C. §1983 for alleged violations of EHA or its regulations (34 C.F.R. §300.512), should be barred.

The Eleventh Circuit Court of Appeals held that an action to recover money damages (e.g., mental pain and suffering)[1] and attorney's fees may be brought pursuant to 42 U.S.C. §§1983 and 1988, when a School Board allegedly delayed completing a "due process" hearing involving a handicapped child where such hearing is required to be completed within 45 days after receipt of a due process hearing request, pursuant to federal regulation (34 C.F.R. §300.512).

[1]See respondent's Petition for Rehearing Before the Panel which sets forth the various injuries suffered for which they seek money damages. App. 40a.

The Court said that the delay in providing the administrative hearing denied the Maneckes "access to the heart of the EHA administrative machinery." 762 F.2d at 919. That decision seemingly conflicts with or misapplies the clear intent of *Smith v. Robinson*, — U.S. —, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). But in any event the decision directly and substantially conflicts with *Austin v. Brown Local School Dist.*, 746 F.2d 1161 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 2114 (1985) and other cases discussed *infra*.

In the district court, the Maneckes were attempting to pursue their claim to a "free appropriate public education" under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (hereinafter §504) and the Civil Rights Act of 1871, 42 U.S.C. §1983 and §1988 (hereinafter §1983 and §1988). The decision of the U.S. Supreme Court in *Smith*, as interpreted and approved by various Courts of Appeal indicates that in cases dealing with the question of what constitutes a "free appropriate public education", the provisions found in the EHA were intended to be the exclusive remedy available to parents of handicapped children and thus claims brought under §504 and §1983, were barred. *Smith*, 104 S.Ct. 3470.

Normally, suits to redress civil rights violations by state officials are authorized by §1983. However, such action is precluded by this Court where the alleged wrongful conduct is based upon a violation of federal statute [or its accompanying regulations] which contains a sufficiently comprehensive remedial scheme, and thus evidences Congress' intent to foreclose an action brought pursuant to §1983. *Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

Smith holds that §615 of EHA contains a sufficiently comprehensive remedial scheme evidencing Congress' intent to foreclose an action under §1983. 104 S.Ct. at 3472. The Maneckes' claim to a free appropriate public education is based upon EHA and its accompanying regulations. They claim that a free appropriate public education was denied to Lauren because the School Board delayed their request for a "due process" hearing beyond the 45 days required by 34 C.F.R. §300.512, and this fact amounted to a denial of "due process" thus entitling them to proceed under §1983 and §1988. The Maneckes' "denial of due process" claim was based solely on or "interwoven" with the "45 day" rule.

The district court disagreed with the Maneckes' theory citing *Maine v. Thiboutot*, 448 U.S. 1, *Pennhurst State School & Hospital v. Haldeman*, 451 U.S. 1(1981), *Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981). The Eleventh Circuit reversed the district court, citing *Victoria L. v. District School Board*, 741 F.2d 369 (11th Cir. 1984), *Teresa Diane P. v. Alief Independent School District*, 744 F.2d 484 (5th Cir. 1984), and *Rose v. Nebraska*, 748 F.2d 1258 (8th Cir. 1984). Although in some of these cases the Appellate Courts recite the "right words" the application of the "independent due process" principle announced by this Court in *Smith* seems to become blurred. 104 S.Ct. at 3470 n. 17.

The conclusion that EHA was intended to be the exclusive remedy in cases like the present one was decided by this Court in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 I Ed 2d 555 (1980) supra; *Middlesex County Sewage Authority v. National Sea Clammers Assn., supra;* and *Smith v. Robinson, supra.*

In *Smith*, this Court considered plaintiff's claim for attorney's fees under §1988. In that case, plaintiffs combined their Fourteenth Amendment equal protection and due process claims under §1983, EHA, and §504. Smiths first challenged the refusal of the School Board to grant them a full hearing before terminating the handicapped child's funding. But this Court said:

> "The fact that petitioner prevailed in their initial due process claim, however, by itself does not entitle them to fees for subsequent administrative and judicial proceedings." 104 S.Ct. at 3467

Smith's second due process claim, which questioned the partiality of the state hearing officer (as did the plaintiffs in *Rose v. Nebraska*, 748 F.2d at 1263,) "involved entirely separate legal theories and, more importantly, would have warranted entirely different relief" than the substantive claim on which plaintiff Smith prevailed. 104 S.Ct. at 3471. Therefore, this Court concluded that a handicapped child and his parents could not rely on EHA, §1983 and §504 in an action for alleged failure to provide the child with a free appropriate public education. The Court, in an opinion authored by Mr. Justice Blackmun, stated:

> "In the view of the Court of Appeals, the fact that the §1983

> claims alleged were based on independent constitutional violations rather than violations of the EHA claims was immaterial. The constitutional claims alleged — a denial of due process, and a denial of free public education because of a handicap — are factually identical to the EHA claims. If a litigant could obtain fees simply by an incantation of §1983, fees would become available in almost every case." *Id. at 3465.*
>
> * * *
>
> "We also conclude that Congress did not intend to have the EHA scheme circumvented by resort to the more general provisions of §1983." *Id.* at 3472

Maneckes contend that their due process claim is presented as an *independent* constitutional claim and, therefore, rely upon language found in the following footnote in *Smith* to support their contention that this Court would permit their claim to be brought under §1983 and §1988:

> "On the other hand, unlike an independent equal protection claim, maintenance of an *independent due process* challenge *to state procedures* would not be inconsistent with EHA's comprehensive scheme." *Id.* at 3470 — 71 n.17. [Emphasis supplied]

However, this is not a case which involves an independent due process challenge to state procedures which this Court discussed in *Smith*. This Court cites *Monahan v. Nebraska*, 645 F.2d 592, 598-99 (8th Cir. 1981) as partial authority for its discussion concerning so-called independent due process challenges and the availability of §1983. In a third appeal to the Eighth Circuit by plaintiff Rose, that Court, in approving the payment of attorney's fees felt that the Supreme Court 'found it unnecessary to decide whether the procedural safeguards set out in the [EAHCA] manifest Congress' intent to preclude resort to §1983 on a due process challenge'; *Id.* 104 S.Ct. at 3470, but the language in the Court's opinion rather strongly implies that an independent due process claim, based upon §1983, does lie under the circumstances of the case before us." 748 F.2d at 1263.

The Eleventh Circuit also agreed that the Supreme Court was "more circumspect in the way it handled the unaddressed due process claim" in *Smith. Manecke*, 762 F.2d at 918.

The present case identifies the important federal question left unresolved by *Smith* which has been interpreted differently by the Sixth Circuit (*Austin*), Eighth Circuit (*Rose*), and Eleventh Circuit (*Manecke*). *Austin* holds that if the due process claim is interwoven with the EHA claim, resort to §1983 would not be permitted. *Rose* holds that if a due process claim is squarely based (interwoven) on the same set of facts upon which plaintiff prevailed under EHA, they are entitled to proceed under §1983 and recover fees. 748F.2d at 1263. *Manecke* holds that where the claim of denial of due process emanates directly from EHA, but the plaintiffs are denied "access" to the EHA procedures, the plaintiff may resort to §1983 and recover money damages and fees. *Smith* holds that EHA is the exclusive remedy in asserting the right to a free appropriate public education, and that resort to §1983 may be permitted only if the plaintiff can allege an independent due process claim.

Maneckes alleged in their amended complaint that they were "denied due process" because the School Board failed to hold and fully complete an administrative hearing within 45 days after a request therefor was made, in violation of 34 C.F.R. §300.512. In *Austin v. Brown Local School Dist., supra*, the Sixth Circuit held that the district court had properly dismissed a due process claim brought pursuant to §1983. Austins claimed they were denied a free appropriate public education when the School Board failed to obey the provisions of EHA and "mistreated" Amy Austin. In that case the Court noted that the Austins:

> "...argue forcefully on appeal that they presented an independent due process claim in this lawsuit, this was never made clear in the district court. Several facts rendered their present position suspect and support defendants' arguments that the §1983 claims were *'interwoven'* with the E.H.A. claims to support those claims." 746 F.2d at 1166 (Emphasis supplied)

Accepting defendant's arguments, the Court of Appeals held that the plaintiff's due process claims were interwoven with the EHA claims and, therefore, were not presented as an independent due process challenge. The Court of Appeals analysis is as follows:

"The §1983 claims, as plead and argued in the district court,

> did not identify an independent due process violation based on infringement of Amy's liberty interest. Rather, relying on *Maine v. Thiboutot*, (citations omitted) the plaintiffs argue that the defendant violated §1983 by failing to obey the commands of the two federal statutes, the EACHA and the Rehabilitation Act. The district court correctly held that plaintiffs could not circumvent procedural requirements of the two comprehensive statutes dealing with handicapped individuals by going directly to federal court under §1983 to obtain adjudication that Amy had been denied the benefits of those statutes. This was one of the clear holdings of *Smith V. Robinson.*" *Id.*

The conclusion that EHA is intended to be the "exclusive remedy" which may not be circumvented begins with *Maine v. Thiboutot*, supra. This line of cases was carefully reviewed by the Seventh Circuit in the case of *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981). This discussion is worthy of inclusion here even though it's pre-*Smith* since it directly relates to the "exclusivity" issue raised by this School Board's Petition for Writ of Certiorari. In *Anderson*, the plaintiffs, like the Maneckes, contended that their action was cognizable under §1983 because they were denied due process.

In holding that the plaintiffs' actions were not cognizable under §1983 and thus were not entitled to attorney's fees under §1988, the Seventh Circuit reviewed a number of cases including Supreme Court decisions which led them to this conclusion. The Seventh Circuit first cited *Tatro v. Texas*, 516 F.Supp. 968 (N.D. Tex. 1981), and noted that the district court said:

> "Section 1983 served 'no purpose other than that of a conduit for attorney's fees' and accordingly held that because 'section 1983 had no greater role than the statute it purportedly enforces, its citation will not trigger a section 1988 attorney's fees provision'." 658 F.2d at 1215.

After quoting from *Tatro*, the Seventh Circuit concluded that *Thiboutot* does not prohibit them from deciding that §1983 is not applicable to the EHA because of the elaborate remedial statutory scheme found therein. The Court said:

> "In *Thiboutot*, the Court considered the Social Security Act which is like the EAHCA in that it contains an elaborate internal remedial scheme but differs from EAHCA in that it fails to provide a private right of action. Section 1983, the Court held, provided a cause of action for plaintiffs who allege that they were harmed by violations of the Social Security Act and were otherwise without a remedy." *Id.*

The Court then noted that the plaintiffs (Anderson) were not without a remedy under EHA because §615(e)(2) provides an express right of action. Thus the Andersons were not dependent upon §1983 for relief. The Seventh Circuit went on to review *Pennhurst State Sch. and Hosp. v. Haldeman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). The Seventh Circuit noted that:

> "The Supreme Court suggested recently in *Pennhurst State Sch. and Hosp. v. Haldeman*, supra, that despite *Thiboutot*, §1983 is not applicable in situations 'where the governing statute provides an exclusive remedy for violations of the Act.'".

Thereupon the Seventh Circuit considered several additional United States Supreme Court cases that led them to the conclusion that where Congress provided a comprehensive statutory scheme which involved an exclusive pre-emptive administrative and judicial scheme, the plaintiffs' remedies would be limited to the remedies found therein and would not be permitted to file their action under the general civil rights law. See *Brown v. GSA*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976); *Great American Fed. S. & L. Ass'n. v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). After examining the reasoning of the Supreme Court in *Penhurst, Brown*, and *Novotny*, the Seventh Circuit concluded:

> "The EAHCA, like the statutes at issue in *Brown* and *Novotny*, contains an elaborate administrative and judicial enforcement system...Moreover, Congress, when enacting the EAHCA, also believed that the rights it was creating had heretofore been inadequately protected under federal law...
>
> "The most compelling reason, however, for our conclusion that section 615(e)(2) is an exclusive remedy is that the relief

it provides is inconsistent with section 1983 relief. Because we hold that EAHCA does not contain a traditional damage remedy, section 615 cannot be given 'unimpaired effectiveness' if a §1983 action is available for EAHCA violations... In the case before us, we have determined that section 615(e)(2) precludes damages absent exceptional circumstances. Because 42 U.S.C. §1983 is not similarly limited in the scope of the relief it provides, the remedies in the two statutes are inconsistent".

* * *

"In sum, the availability of a private right of action under EAHCA, the detailed statutory administrative and judicial scheme, the fact that Congress intended EAHCA to create new rights, in the absence of a traditional damage remedy, together compel our conclusion that the judicial remedy provided in EAHCA was not intended to be exclusive. The EAHCA does not itself provide for attorney's fees and plaintiffs cannot rely on section 1983 as a conduit to attorney's fees under section 1988". *Id.* at 1216, 1217.[2]

[2]Also see *Coe v. Michigan Dept. of Eduction*, 693 F.2d 616 (6th Cir. 1982); *Miner v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982); *McGovern v. Sullins*, 676 F.2d 98 (4th Cir. 1982).

In addition to the clear pronouncements by the First[3], Fourth, Sixth, Seventh and Eighth circuits, the Court's attention is directed to *Davis v. Maine Endwell Central School Dist.*, 542 F.Supp. 1257 (N.D.N.Y. 1982) and *Diamond v. McKenzie*, (unpublished opinion) U.S. District Court for the District of Columbia, #CA-84-0241 filed January 22, 1985, and *Tschanneral v. District of Columbia Board of Education*, 594 F.Supp. 407, 409 (D.D.C. 1984) which hold that §1983 may not be used as a vehicle to establish rights which may be addressed by resort to EHA, even though plaintiff claims a violation of constitutional due process.

The parents of handicapped children usually combine their EHA claims with alleged due process and equal protection claims pursuant to §1983 or §504 for the purpose of seeking attorney's fees under §1988 or §505. They are not satisfied with the remedy provided by the EHA even though this Court concluded that Congress intended the EHA to be the "exclusive avenue through which a plaintiff may assert a claim to a publicly financed education." 104 S.Ct. at 3468. *Smith* clearly holds that since EHA provides sufficient mechanisms to provide a child with "free appropriate public education", there is no need to assert claims of equal protection or due process through §1983 or §504 just to claim money damages and attorney's fees which would not be available under EHA. This Court held that Congress intended, when it created EHA, to give the parents of handicapped children a whole range of rights which were not otherwise available to them and that Congress did not intend to broaden the rights of handicapped children beyond that which is contained in EHA — in order to further reduce the limited resources available to the providers of public education. Each dollar spent on attorney's fees and money damages is just that much less money available to educate a handicapped child.

The Eleventh Circuit Court of Appeals decision in the instant case provides a different standard of recovery in cases where an alleged violation of the due process clause is interwoven with or

[3]*Smith v. Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983).

factually identical to an EHA claim and not independent of EHA. Under this standard the plaintiff is permitted to recover for personal injuries (e.g., mental pain and suffering) and attorney's fees under §1988, in addition to the claims allowed under EHA, e.g., reimbursement of tuition expense at a private school.

The Eleventh Circuit failed to recognize that the alleged due process violation could not stand on its own merits without reference to the EHA. Without an allegation that the School Board violated the 45 day rule, the Maneckes would have no due process violation claim. Their alleged due process violation claim fails if it does not reference EHA and its regulations, in particular 34 C.F.R. §300.512. In other words, Maneckes do not have a case of due process violation without a claim that the School Board missed the 45 day deadline. This is not an "independent due process" claim, but one that is factually identical, or interwoven with, their claim to a "free appropriate public education."

The School Board argues as did Respondents in *Smith* that the Maneckes merely attempt to "circumvent the lack of attorney's fees and money damages in EHA by resorting to the pleading trick of adding surplus constitutional claims and similar claims", with an "incantation of §1983," in order to obtain those benefits. 104 S.Ct. 3465, 3466.

Before and after *Smith* the Circuit Courts of Appeal and district courts followed the earlier pronouncements of this Court in holding that EHA provided the exclusive remedy available to the parents of a handicapped child when the parent asserts the right of that child to a "free appropriate public education". That is still good law, and should not be eroded by simplistic conclusionary pleading, claiming independent due process violation when in fact the remedy sought by the parents is relief under EHA — a free appropriate public education.

This Court should reaffirm the principle of "exclusivity" as announced in *Middlesex* by permitting parents to seek relief under EHA as intended by Congress, rather than confusing said principle by permitting due process claim under §1983.

Also *Smith* denied the recovery of attorney's fees under §1988 based upon a substantial, unaddressed equal protection claim that was "virtually identical to their EHA claims", for the reason that

"Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." 104 S.Ct. at 3468. The Court further reasoned that where the equal protection claim "added nothing to the petitioner's claims under EHA," and the equal protection claim therefore "had nothing to do with a plaintiff's success" fees should not be awarded on the basis of such claims. Id. at 3468 n. 12. The Court concluded that "where EHA is available to a handicapped child asserting a right to a free and appropriate public education, based either on the EHA or Equal Protection Clause... the EHA is the exclusive avenue through which the child and his parents,..can pursue their claim." *Id.* at 3470.

Much of the same reasoning led this Court to the conclusion that the plaintiff could not recover fees based on the Rehabilitation Act either. There seems to be no rational distinction as to why the due process clause and equal protection clause should be treated differently when pursuing a claim under EHA unless the due process claim is truly independent of the EHA claim. These "independent due process" claims discussed in *Smith* were all related to a request for injunctive relief, not a demand for money damages as is the situation in the instant case. See *Smith, Teresa Diane P., Rose, Victoria L.* Footnote 17, 104 S.Ct. 3470, did not eliminate the principle laid down by the earlier cases which held that when a federal statute provides a comprehensive remedial scheme, resort to the general civil rights law would not be permitted. This Court made that very clear when it said:

> "We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate education based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim." 104 S.Ct. at 3470

CONCLUSION

In applying the foregoing principles to the present case, the con-

clusion is inescapable that the Maneckes are not entitled to proceed under §1983. The elaborate remedial scheme provided by EHA dictates the conclusion that Congress intended it to be the exclusive remedy in cases of this type. *Smith, Novotny, Middlesex, Pennhurst, Anderson, McGovern.* Furthermore, there is no question that the Maneckes were not denied "access" to any federally supported educational program. On at least two occasions a due process hearing was offered in good faith to the Maneckes which they refused to attend. The respondents complain that the School Board failed its responsibilities under federal regulation, but the Maneckes also failed to adhere to their responsibilities by maintaining the "status quo". The trial court found that the school officials acted honestly and sincerely in order to resolve the frustrating situation for the Maneckes. The issue before the trial court was one concerning the appropriateness of Lauren's educational placement and not one of exclusion from an educational program. The Maneckes' claim is that they were denied due process to a free appropriate public education. But if that were the case, they could have filed an action for injunctive relief under §1983 in order to commence the process.

Permitting the Eleventh Circuit Court of Appeals decision to stand in this case is grossly unfair to the school districts since they may be required to respond to claims for money damages and attorney's fees each time a complaint is filed alleging that it might have failed to strictly comply with all the detailed requirements of EHA and its numerous regulations. Unless the question present herein is resolved by this Court, the erroneous principle announced by the Eleventh Circuit Court of Appeals is likely to be repeated in subsequent cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded by U.S. Mail to Gardner W. Beckett, Jr. Esq., 123 Eighth Street North, St. Petersburg, Florida 33701 on this 3rd day of December, 1985.

B. Edwin Johnson

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT.

RICHARD B. MANECKE, et al.,
Plaintiffs-Appellants,

v.

SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, etc.,
Defendant-Appellee.

Gardner W. Beckett, Jr., St. Petersburg, Fla., for plaintiffs-appellants.

B. Edwin Johnson, Clearwater, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and JOHNSON, Circuit Judges, and DYER, Senior Circuit Judge.

FAY, Circuit Judge:

Lauren Manecke, by and through her parents, legal guardians and next friends, Richard and Julia Manecke ("the Maneckes"), brought this action against the Pinellas County School Board ("the Board"). In their amended complaint, the plaintiffs alleged that the Board's failure to provide them with a timely, impartial due process hearing violated their rights under § 504 of the Rehabilitation Act of 1973 (the Rehabilitation Act) 29 U.S.C. § 794, and 42 U.S.C. § 1983, and thus entitled them to reimbursement of funds spent to place Lauren in a private residential educational setting. The district court dismissed the amended complaint, holding that damages were not recoverable under either § 504 or § 1983. *Manecke v. School Board,* 553 F.Supp. 787 (M.D.Fla.1982). Plaintiffs thereafter were granted leave to file their second amended complaint. They again sought tuition reimbursement, this time pursuant to the Education of the Handicapped Act (EHA), 20 U.S.C. § 1415. After a two day bench trial, the district

court found in favor of the Board. This appeal followed. For the reasons which follow, we affirm in part, reverse in part, and remand this case to the district court.

I. FACTUAL BACKGROUND

Lauren Manecke had suffered brain damage at birth. As a result, she was epileptic and also exhibited other mental and emotional handicaps. Despite these problems, Lauren had been enrolled in "regular" school programs supplemented with special education classes until February, 1979, when her then current high school placement came to a halt.

Lauren left the high school with a thirty-two year old man with whom she was having a sexual relationship. She stayed with him away from her home for six days. Both before and after this episode, Lauren acted in a sexually provocative manner. It seems she employed sex as a means of asserting her independence and maturity.

When Lauren returned from her stay with the older man, her parents withdrew her from the high school she was attending and enrolled her in a small private school. Mrs. Manecke thereafter requested that the Board enroll Lauren in a county special education school. The Board agreed, and Lauren commenced attending classes at the Nina Harris School for exceptional children ("Nina Harris") in September, 1979. Lauren was evaluated and classified as emotionally handicapped and physically impaired. Before she began at Nina Harris, an individual education program ("IEP") for Lauren was developed by the Board in conjunction with her parents. *See infra* note 4 and accompanying text.

Lauren seemed to be adjusting well to Nina Harris: she was making adequate academic progress, appeared well-behaved, and participated in some extracurricular social activities. The quality of Lauren's homelife, however, was rapidly deteriorating. She fought incessantly with family members, especially her mother and younger brother.

On December 19, 1979, Mrs. Manecke wrote Dr. Howard J. Hinesley, the Board's Assistant Superintendent for Exceptional Student Education. In a two page typewritten letter, Mrs. Manecke expressed her concern over Lauren's emotionally charged behavior, and the Maneckes' desire to place Lauren in an out-of-state residential

facility.[1] Mrs. Manecke attached to the typewritten letter a handwritten note requesting a due process hearing on the issue of Lauren's appropriate educational placement.

Dr. Hinesley forwarded copies of the letter and request for due process hearing to the school district's attorney. Dr. Hinesley assumed that the attorney's office would take any necessary action relative to the due process hearing.

Mrs. Manecke sent a copy of her December 19, 1979, correspondence to the Florida Commission of Education. In response, Diane Wells, an administrator with that agency, instructed Dr. Hinesley to mediate the dispute between the Board and the Maneckes; he was specifically advised to avoid resort to more formal procedures. The Maneckes, Dr. Hinesley and Mr. Delp met on February 13, 1980. The Maneckes stated that because of Lauren's intractability, they believed residential placement was necessary. Dr. Hinesley and Mr. Delp, however, expressed their belief that the Board was providing Lauren with an appropriate education at Nina Harris. Consequently, it was their position that the expense of residential placement need not be borne by the school board.

The Maneckes suggested that Dr. Hinesley and Mr. Delp meet with Dr. Andriola, Lauren's treating neurologist, and Dr. John Mann, an adolescent psychologist. Dr. Hinesley acceded to this request, and, on March 12, 1980, the meeting was held. The Maneckes asked if this meeting was their due process hearing and if their attorney should be present. Dr. Hinesley responded that the meeting was merely an informal effort to resolve the dispute over Lauren's placement. Although Dr. Hinesley did not waiver in his belief that the Board was not required to pay for Lauren's placement in a residential facility, he did end the meeting by promising to furnish the Maneckes with information concerning sundry residential facilities.

[1]This was not the first time that the Board was apprised of the Maneckes' interest in residential schools; during the IEP conference held prior to Lauren's enrollment in Nina Harris, Lauren's parents asked Mr. William Delp, Nina Harris' Director of Admissions for Exceptional Students, for information about such facilities.

Immediately after this meeting, the Maneckes were contacted by the Devereux School for exceptional children. They were told that Devereux, which is located in Texas, had a rare residential placement vacancy which Lauren could fill if she were promptly enrolled. The Maneckes agreed to Devereux's terms and withdrew Lauren from Nina Harris on March 21, 1980. The Board was not informed why Lauren was removed from school. The Maneckes then enrolled Lauren in Devereux.

Mrs. Manecke later complained to the United States Office of Civil Rights (OCR) that the Board unlawfully refused to place Lauren in a residential facility because of her age. As a result of that agency's mediation efforts, the Board, in July of 1980, sent Lauren's parents a standard request for due process hearing form. Although the Maneckes received it, it was never returned to the Board. The OCR dropped the age discrimination charge in December, 1980. The OCR did, however, order the Board to hold a due process hearing. The hearing, scheduled for January 26, 1981, was cancelled by the Maneckes.

II. PROCEDURAL HISTORY

The gravamen of plaintiffs' two-count amended complaint, brought under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Civil Rights Act of 1871, 42 U.S.C. § 1983, was that the board's failure to provide them with a due process hearing on the issue of Lauren's educational placement within 45 days of Mrs. Manecke's December 19, 1979 request, *see* 34 C.F.R. 300.512, necessitated their unilateral transfer of Lauren to a residential facility. The relief they sought was an order requiring the Board to reimburse them for Lauren's tuition at Devereux and other expenses.

The Board did not answer the amended complaint; instead, it filed a motion to dismiss. The Board argued that: (1) § did not authorize an award of damages to a private litigant; (2) even if it did, the Maneckes waived their rights under that statute; and (3) plaintiffs could not employ § 1983 as a basis for recovery because doing so constituted an "end run" around the administrative process established in the EHA.

The district court accepted the Board's position on § 504, concluding that there is no private right of action for damages under that statute. *Manecke*, 553 F.Suppl. at 790. With respect to the § 1983 count, the court essentially held that allowing plaintiffs to pursue that damage claim would be inconsistent with its ruling that a private plaintiff is entitled only to injunctive or declaratory relief under § 504. *Id.* at 791. The district court therefore dismissed the amended complaint.

Because the court hinted that the plaintiffs could state a claim under the EHA, *see id.* at 790 n. 4, the plaintiffs moved for leave to amend the complaint to allege a violation of that Act. The court granted the motion, plaintiffs' second amended complaint was filed, and a two-day bench trial was held on the EHA claim.

The district court, relying on *Powell v. Defore*, 699 F.2d 1078 (11th Cir.1983), and *Anderson v. Thompson*, 658 F2d 1205 (7th Cir.1981), held that plaintiffs were not entitled to relief under the EHA.[2] This appeal followed.

[2]In *Powell* we noted that "[a]s a general rule, compensatory damages are not available under the [EHA]." *Powell*, 699 F.2d at 1081. We also added, however, that damages may be awarded in an EHA case if the plaintiff establishes the existence of "exceptional circumstances." *Id.* (citing *Anderson*, 658 F.2d 1205). The Seventh Circuit, in *Anderson*, held that there were two circumstances in which the parents could be awarded reimbursement for educational expenses in an EHA case, even though the parents unilaterally transferred the child: (1) where the school district's placement of the child would endanger the child's physical health, 658 F.2d at 1213-14; and (2) where the school district "acted in bad faith by failing to comply with the procedural provisions of [the EHA] in an egregious fashion." *Id.* at 1214.

The district court concluded that continued placement at Nina Harris did not pose a threat to Lauren's physical health. It also held that the Board was not acting in bad faith when it failed to provide the plaintiffs with a timely due process hearing. Accordingly, the district court ruled that plaintiffs were not entitled to damages under the EHA.

The *Anderson* test for reimbursement referred to in *Powell* no longer is good law. In *Burlington School Comm. v. Dept. of Educ.*,— U.S. —, —, 105 S.Ct. 1996, 2001-2002, 85 L.Ed.2d 385 (1985), the Supreme Court had occa-

On appeal, the Maneckes essentially contend that: (1) the district court erred in dismissing the amended complaint brought alternatively under § 504 and § 1983: (2) the district court erred in applying the *Powell-Anderson* test for damages under the EHA to the facts of this case; and (3) the district court exceeded its authority under the EHA by effectively conducting its own impartial due process hearing. After a brief overview of the EHA, we will address these contentions seriatim.

[2]continued
sion to resolve the following issues: "whether the potential relief available under [20 U.S.C.] § 1415(e)(2) includes reimbursement to parents for private school tuititon and related expenses, and whether [20 U.S.C.] §1415(e)(3) bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local [school] authorities." With respect to the first issue, the Court held that the EHA authorizes a reviewing court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such a placement, rather than a proposed IEP, is proper under the Act." — U.S. at —, 105 S.Ct. at 2002. The Court did not condition the availability of reimbursement on a showing of exceptional circumstances, nor did the decision it affirmed. *See Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 797-99 (1st Cir.1984). On the second issue, the Court ruled that parents who unilaterally change the placement of their child during the pendency of the administrative review proceedings, in contravention of "the conditional command of § 1415(e)(3)," do not forfeit their right to reimbursement if the court decides that their placement decision was appropriate under the EHA. — U.S. at —, 105 S.Ct. at 2004.

It bears mentioning that the Court emphasized that court-ordered reimbursement is not the equivalent of an award of damages. *Id.* at —, 105 S.Ct. at 2002. We thus discern no sound reason for questioning the result reached in *Powell*, a case in which the plaintiffs sought tort-type damages, not tuition reimbursement. *See Powell*, 699 F2d at 1081. *Anderson*, however, like the instant case, did involve tuition reimbursement. In light of *Burlington School Comm.*, the district court's reliance on *Anderson* was misplaced. Because we hold today that the district court should not have tried the EHA claim, see infra Part V, the district court's error in applying to the facts of this case the *Anderson* test for reimbursement does not figure prominently in our decision.

III. THE EHA[3]

The EHA provides public school districts with federal funding for the education of handicapped children so long as the "[s]tate has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). A "free appropriate public education" is defined as "special education and related services" which, *inter alia*, are provided in conformity with the IEP.[4] *Id.* § 1401(18). The IEP serves to tailor the "free appropriate public education" mandated by the Act "to the unique needs of the handicapped child." *Board of Education v. Rowley*, 458 U.S. 176, 181, 102 S.Ct. 3034, 3038, 73 L.Ed.2d 690 (1982). Moreover, federal regulations provide that if necessary to give a handicapped child special education and related services, the state must place that child in a public or private residential program at public expense. 34 C.F.R. § 300.302.

[3]Much has been written by the Supreme Court, this court, and the commentators about the genesis and substantive and procedural aspects of the EHA. *See e.g., Burlington School Comm. v. Dept. of Educ.*, — U.S. —, 105 S.Ct. 1996, 85 L.Ed.2d 385; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir.1983), *vacated and remanded*, — U.S. —, 104 S.Ct. 2581, 82 L.Ed.2d 880 (1984), *on remand*, 740 F.2d 902 (11th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985); Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv.L.Rev. 1103 (1979). We therefore confine our discussion of the EHA to only those provisions of the Act which are pertinent to the resolution of this case.

[4]The IEP is defined as a:

written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, in-

The EHA also contains a detailed procedural component. Any state or local agency receiving federal assistance under the Act must, in accordance with the requirements of 20 U.S.C. §1415, establish and maintain procedural safeguards. Among these is the requirement that parents be given the opportunity to contest virtually any matter concerning the educational placement of the handicapped child, or the provision of a "free appropriate public education" to such child. *Id.* § 1415(b)(1)(E). Additionally, if the parents of a handicapped child decide to bring a complaint, they must be given an "impartial due process hearing." *Id.* § 1415(b)(2). Federal regulations mandate that a hearing must be held and a final decision must be reached not later than 45 days after the public agency receives a request for a hearing. 34 C.F.R. § 300.512. Upon completion of the administrative process, any party dissatisfied with the administrative final decision may "bring a civil action with respect to the complaint" in either state or federal court. 20 U.S.C. § 1415(e)(2).

The Maneckes, relying on *Smith v. Robinson*, — U.S. —, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), argue that the district court erroneously dismissed both counts of their amended complaint. They essentially contend that in the unique circumstances of this case, the EHA is not the exclusive avenue through which to seek relief. The Board, of course, disagrees. First, the Board insists that *Smith* requires us to affirm the district court's dismissal of the § 1983 count, albeit for reasons not articulated by the trial court. Second, the Board contends that the § 504 count failed to state a claim because (1) the amended complaint alleges no discrimination; (2) money damages are not available under that statute; and (3) *Smith* holds that the EHA is the sole

[4]continued
cluding short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.
20 U.S.C. § 1401(19).

remedy for handicapped children seeking a free appropriate public education. After carefully considering the arguments of both sides, we conclude that the district court erred in dismissing the § 1983 claim but correctly dismissed the § 504 claim.

IV. (a) § 1983 AND THE EHA

The plaintiffs and the Board read *Smith* as supporting their respective positions on § 1983. A review of that case is therefore appropriate.

In *Smith* the plaintiffs brought suit under the EHA, § 504 of the Rehabilitation Act, and § 1983. The § 1983 claim was based on alleged violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The plaintiffs ultimately obtained relief on the basis of state law. Although the EHA does not provide for attorney's fees to a prevailing party, the district court awarded plaintiffs fees and costs in the amount of $32,109. The court based the award on 42 U.S.C. § 1988, because plaintiffs had stated independent constitutional claims via § 1983, and on § 505 of the Rehabilitation Act, 29 U.S.C. § 794a(b), because plaintiffs had alleged a violation of § 504.[5] On appeal, the First Circuit reversed. *Smith v. Cumberland School Committee*, 703 F.2d 4 (1st Cir.1983).

The Supreme Court affirmed the court of appeals, holding that the plaintiffs were not entitled to attorney's fees under either § 1988 or § 505 of the Rehabilitation Act. *Smith*, 104 S.Ct. 3457. The Court arrived at this conclusion after examining the law on awarding attorney's fees on the basis of substantial, though unaddressed, constitutional claims, *see Hensley V. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and the substantive aspects and detailed procedural requirements of the EHA, a statutory scheme which does not mention attorney's fees.

[5] 29 U.S.C. § 794a(b) provides that:

In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Court, after noting that the plaintiffs' unaddressed due process and equal protection claims, bought under § 1983, were virtually identical to the EHA claims, undertook a separate analysis of these independent constitutional claims. The Court recognized "the comprehensive nature of the procedures and guarantees set out in the EHA" as well as the intent of Congress "to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child." *Smith*, 104 S.Ct. at 3469. The court also noted that in enacting the EHA, Congress attempted to accommodate the equal protection claims of handicapped children. *Id.* at 3472. With these factors in mind, the Court concluded that where a handicapped child asserts a right to a free appropriate public education, and the EHA is available, a claim based either on the EHA or on the Equal Protection Clause may be brought *only* under the EHA. *Id.* at 3470. Hence, the plaintiffs were not entitled to fees on the basis of their § 1983 equal protection claims.

The Court was more circumspect in the way it handled the unaddressed due process claim. The Court raised but did not decide the issue of "whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983 on a due process challenge." *Id.* It was not necessary to resolve this threshold issue because the due process claim simply had no bearing on the substantive issue of the lawsuit—which agency was required to pay for the education of the minor handicapped plaintiff—and therefore could not support the award of fees. *Id.* at 3471.

The Board urges that *Smith* supports the district court's dismissal of the § 1983 claim. The Board, however, reads that decision more broadly than we do, and totally ignores the fact that the Court in *Smith*, admittedly in dicta, took pains to distinguish a due process claim from an equal protection claim.

Smith suggests that not all § 1983 claims are to be treated alike. Indeed, the Court expressly noted that the issue raised by an independent due process challenge "is not the same as that presented by a substantive equal protection claim to a free appropriate public education." *Id.* at 3470 n. 17. Further, "unlike an independent equal

protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme." *Id.* at 3471 n. 17. Finally, speaking specifically to the issue of attorney's fees, the Court noted that Congress has not indicated "that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they were constitutionally due." *Id.*

In our view, the approach the Supreme Court employed in *Smith* counsels holding that where, as here, a party is denied due process by effectively being denied access to "the carefully tailored administrative and judicial mechanism" found in the EHA, *id* at 3468, that party may seek relief under § 1983. The thrust of the Court's equal protection claim holding is unmistakable: Congress enacted the EHA, with its panoply of procedures, to clarify and make enforceable the handicapped child's right to a free appropriate public education. This right is grounded on the Equal Protection Clause.[6] Accordingly, a plaintiff asserting that *equal protection right* as a basis for relief understandably should do so via the EHA, with all that that implies. This rationale, however, breaks down in the facts of this case.

[6]The Court repeatedly referred to Congress' desire to create a statutory avenue through which handicapped persons could secure what Congress perceived to be their equal protection right to a free appropriate education. *See Smith,* 104 S.Ct. at 3468 ("Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the...mechanism set out in the [EHA]"); *id.* (quoting S.Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S.Code Cong. & Ad.News 1425, 1430) ("Congress...recognized that in a series of 'landmark cases,' the right to an equal education opportunity for handicapped children had been established"); 104 S.Ct. at 3468 (quoting S.Rep. No. 168, 94th Cong., 1st Sess. 13, *reprinted in* 1975 U.S.Code Cong. & Ad.News 1425, 1437) ("It is the intent of the Committee...to provide assistance to the States in carrying out their responsibilites under...the Constitution of the United States to provide equal protection of the laws' "); 104 S.Ct. at 3470 ("Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped

The EHA "establishes an enforceable substantive right to a free appropriate public education." *Id.* Moreover, Congress intended "the carefully tailored administrative and judicial mechanism" set forth in the EHA to be the vehicle to enforce that right. *Id.* The plain language of the statute itself, however, suggests that Congress must not have intended the EHA to be the exclusive method to redress *denial of access* to that very mechanism.

The EHA provides that "[a]ny party aggrieved by the findings and decision" resulting from the administrative proceeding may bring an action with respect to the complaint presented initially to educational authorities. 20 U.S.C. § 1415(e)(2). Additionally, the court, when reviewing the administrative proceedings, "shall receive the records of the administrative proceedings, shall hear additional evidence [upon request], and, basing its decision on the preponderance of the evidence, shall grant....relief." *Id.* We believe that this language presupposes the existence of an administrative hearing or record. Moreover, the Supreme Court has instructed that this statutory language "is by no means an invitation to the [reviewing] courts to substitute their own notions of sound educational policy for those of school authorities." *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051. Rather, the state administrative proceedings are to be given "due weight," mainly because "[t]he primary responsibility for formulating the education to be accorded a handicapped child...was left by the Act to state and local educational agencies in cooperation with the parents...of the child." *Id.* at 207, 102 S.Ct. at 3051. The Court therefore also has made it clear that the principal office of a court proceeding under the EHA is to *review* the administrative determinations contemplated by the Act. With these principles in mind, we conclude that where, as here, the local educational agency deprives a handicapped child of due process by

[6]continued
child to a public education"); *id.* at 3472 ("[I]n enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal Protection Clause required that they be ensured access to public education.").

effectively denying that child access to the heart of the EHA administrative machinery, the impartial due process hearing, an action may be brought under § 1983.

Post-*Smith* case law supports our conclusion. In *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir.1984), the plaintiff brought suit under the EHA, § 1983, and § 504 of the Rehabilitation Act. The § 1983 claim was that the hearing procedures adopted by the state destroyed the impartiality of the due process proceeding, in violation of the Due Process Clause of the Fourteenth Amendment. The district court granted injunctive relief. After two appeals, the district court finally awarded, pursuant to § 1988, attorney's fees for services rendered in connection with the successful request for an injunction.

Characterizing the § 1983 "due-process-type"claim as "parallel" to the EHA claim, the court affirmed the award of attorney's fees. *Id.* at 1261. The court's position was that *Smith* "rather strongly [implied] that an independent due-process claim, based on § 1983, [did] lie" under the facts before it. *Id.* at 1263. The court reasoned that "notwithstanding the fact that the same theory is also the basis for a claim under the [EHA] itself," *id.,* the clear implication of the Court's discussion in *Smith* concerning a due process challenge is "that a § 1983 suit and a fee award are appropriate when a plaintiff claims that he is being denied due process" because of the partiality of the EHA administrative hearing, *Id.*

A recent Fifth Circuit decision also is instructive. In *Teresa Diane P. v. Alief Independend School District*, 744 F.2d 484 (5th Cir.1984), the plaintiffs brought suit alleging that the defendants denied Diane a free appropriate public education in violation of the EHA, the Rehabilitation Act, and § 1983. The plaintiffs also alleged that the defendants denied Diane procedural due process by failing "to adhere to the specific procedural safeguards provided by the Texas Education Agency pursuant to the [EHA]," in violation of § 1983. *Id.* at 491. After the plaintiffs were awarded a preliminary injunction, the parties settled the case. The district court awarded attorney's fees to the plaintiffs pursuant to the Rehabilitation Act, 29 U.S.C. § 794a(b), *see supra* note 5, and § 1988. The defen-

dants appealed.

The Fifth Circuit, relying on *Smith*, concluded that attorney's fees could not be awarded: (1) for representation done in connection with the adminstrative procedures under the EHA; (2) for work attributable to the § 1983 claim based either on the EHA or an equal protection theory; or (3) for time spent on the Rehabilitation Act claim. *See infra* note 9. The court, however, treated the § 1983 procedural due process claim differently. Mindful of the distinction made by the Supreme Court in *Smith* between an equal protection claim and a due process claim, the Fifth Circuit held that "attorney's fees may be appropriate in [EHA] cases where procedural due process claims are involved," *Teresa Diane P.*, 744 F.2d at 491, and remanded the case on "the issue of whether substantial procedural due process claims were effectively raised and maintained." *Id.*

We find additional support for our decision in a recent Eleventh Circuit case. This court, in *Victoria L. v. District Court Board*, 741 F.2d 369 (11th Cir.1984), affirmed the district court's summary judgment in favor of the defendant school board. The significance of this case, however, is not its holding; rather, for our purposes, the most important aspect of the case is the manner in which it reached that holding.

This court, on the basis of *Smith*, concluded that the plaintiffs could not assert their equal protection claim under either the Rehabilitation Act or the Fourteenth Amendment since the EHA is the "'exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education.'" *Id.* at 372 (quoting *Smith*, 104 S.Ct. at 3468). The plaintiffs' procedural due process claim, however, was not disposed of quite so summarily.

We initially noted that in *Smith* the Supreme Court did not resolve the § 1983—EHA/exclusivity issue when a due process claim is involved. *Victoria L.*, 741 F.2d at 372. Rather than simply holding that a due process challenge could not be maintained apart from the EHA, we assumed that the conclusory allegations in the complaint that the defendants violated the Fourteenth Amendment

by failing to comply with the procedural provisions of the EHA were sufficient to state a constitutional claim. *Id.* We held that summary judgment for the defendants was proper, however, because a review of the record revealed that the defendants in no way contravened the procedural requirements of the EHA. That review would have been unnecessary had we not recognized that a due process challenge, at least in certain circumstances, could be maintained outside of the EHA.[7]

In short, based on the language of the EHA itself, the *Smith* decision, and post-*Smith* case-law, we hold that the district court erroneously dismissed plaintiffs' § 1983 due process claim. We accordingly remand on that issue.

IV. (b) THE REHABILITATION ACT

The Maneckes next argue that the district court should not have dismissed their claim brought under § 504 of the Rehabilitation Act. We disagree.

[7]The plaintiffs also rely on a pre-*Smith* case decided by the Second Circuit. In *Quackenbush v. Johnson City School Dist.*, 716 F.2d 141 (2d Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1426, 79 L.Ed.2d 750 (1984), the plaintiff alleged, *inter alia*, that through a policy of the school district, her handicapped son was deprived of a free appropriate public education and the opportunity to avail himself of the procedural safeguards established in the EHA. The plaintiff, who sought damages, brought the action under the EHA, the Rehabilitation Act, and § 1983.

The Second Circuit recognized that "the judicial review contemplated by § 1415(e)(2) is the exclusive means for reviewing a *final* administrative decision under the EHA," *id.* at 147 (emphasis in original), yet rejected the defendants' argument that the plaintiff could seek relief solely under the EHA. The plaintiff alleged that defendants' conduct deprived her and her son of the chance to utilize the EHA's procedural safeguards. The plaintiff and her son therefore moved to another school district and never filed an administrative complaint. In these circumstances, the *Quackenbush* court reasoned that judicial review was not expressly provided by the EHA because the plaintiff was not a "party aggrieved by the findings and decision" following an administrative due process hearing. *Id.; see* 20 U.S.C. § 1415(e)(2), supplies "the right of action to a plaintiff who has been denied

"The Rehabilitation Act of 1973 establishes a comprehensive federal program aimed at improving the lot of the handicapped." *Consolidated Rail Corp. V. Darrone,* 465 U.S. 624, —, 104 S.Ct. 1248, 1250, 79 L.Ed.2d 568, 573 (1984). Section 504 of the Rehabilitation Act provides in pertinent part:

> No otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. § 794. Unlike the EHA, "§ 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons." *Smith,* 104 S.Ct. at 3473, *see Southeastern Community College v. Davis,* 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979).

[7]continued
procedural safeguards under § 1415 and who, as a result thereof, has not received the findings and decision following the impartial due process administrative hearing contemplated by § 1415." *Id.* at 148.

Quackenbush has been questioned in light of the recent *Smith* decision. *See DeLeon v. Susquehanna Community School Dis.,* 747 F.2d 149, 150 n. 1 (3d Cir.1984) (*Quackenbush* holding that "§ 1983 is available to fill in the 'gap' in the EHA remedies" has been "called into serious question" by *Smith*). It is, however, difficult to ignore the plain language of § 1415(e)(2) with its references to antecedent administrative proceedings. We note that the continued vitality of *Quackenbush* was recently affirmed by a district court sitting in the Second Circuit. *See Blazejewski v. Bd. of Educ.,* 599 F.Supp. 975 (W.D.N.Y.1985) (court relied on *Smith* and *Quackenbush* to award attorney's fees to prevailing plaintiff).

We agree that *Quackenbush* supports our § 1983 holding in this case. We concur in principle with the conslusion implicit in the Second Circuit's holding that § 1983 may be used to seek relief for a deprivation of due process rising to the level of denial of access to the impartial hearing mechanism. Beyond this, we need not, and therefore do not, express any opinion on the soundness of the Second Circuit's opinion.

The district court ruled, as a matter of law, "that there is no private right of damages under Section 504 in this Circuit." *Manecke*, 553 F.Supp. at 790. The Board argues that this conclusion is correct,[8] and, in any event, *Smith* requires an affirmance

[8]What the law is concerning the available remedies for a violation of § 504 has been called a "murky question." *Parks v. Pavkovic*, 753 F.2d 1397, 1409 (7th Cir.1985). We agree. The issue of money damages appears to be an open one in the Supreme Court. *See Smith*, 104 S.Ct. at 3473 n. 24. ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504..."). Much of the confusion has been engendered by the interplay between § 504 and § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin in federally-assisted programs.

Congress, in 1978, amended the Rehabilitation Act and, pursuant to § 505(a)(2), 29 U.S.C. § 794(a)(2), made available the "remedies, procedures, and rights" found in Title VI to anyone discriminated against in violation of § 504 of the Act. The district court understandably consulted circuit precedent on Title VI relief. *See Drayden v. Needville Indep. School Dist.*, 642 F.2d 129, 133 (5th Cir.1981) (Title VI relief limited to cessation of discriminatory activity; backpay or other losses not recoverable). Relying on *Drayden*, the district court concluded that damages similarly could not be recovered under § 504. *Manecke*, 553 F.Supp. at 790.

After the district court dismissed the § 504 claim, however, this court decided *Powell*, 699 F.2d 1078. In that case we observed, citing *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir.1982), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983), and *Miener v. Missouri*, 673 F.2d 969, 979 (8th Cir.), *cert. denied*, 459 U.S. 909, 916, 103 S.Ct. 215, 230, 74 L.Ed.2d 171, 182 (1982), that § 504 "has been interpreted to provide a cause of action for compensatory damages." *Powell*, 699 F.2d at 1082. We affirmed the district court's refusal to award damages, though, because we were unable to discern any unlawful discrimination.

Four months after this court decided *Powell*, the Supreme Court handed down *Guardians Ass'n v. Civil Serv. Comm'n.*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), a badly fragmented decision which construed Title VI. Although none of the various opinions garnered majority support, a reading of them reveals that at least five Justices would not allow *compensatory* relief to a private plaintiff under Title VI absent proof

of the district court.[9] We need not address either of these contentions, however, because we hold that plaintiffs have not alleged sufficient facts to state a claim under § 504, regardless of whether damages may be recovered under that statute.

[8]continued
of discriminatory intent. *See id.* 103 S.Ct. at 3235 n. 27. More recently, the Supreme Court, in *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984), explicity applied Title VI jurisprudence to a § 504 claim. The plaintiff in *Darrone* brought suit under § 504 for backpay. Mindful of the 1978 amendments to the Rehabilitation Act, the court found it necessary to examine its Title VI decision in *Guardians*. The Court stated: "In *Guardians*...a majority of the Court expressed the view that a private plaintiff under Title VI could recover backpay; and no members of the court contended that backpay was unavailable, at least as a remedy for intentional discrimination." *Id.* 465 U.S. at —, 104 S.Ct. at 1252, 79 L.Ed.2d at 574. The Court applied this interpretation of Title VI to the § 504 claim before it, and concluded "that § 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay." *Id.* 465 U.S. at —, 104 S.Ct. at 1252, 79 L.Ed.2d at 574. The Court unfortunately did not determine "the extent to which money damages are available under § 504." *Id.*

At least one circuit, the new Fifth, reads *Guardians*, as did the Court in *Darrone*, as fully applicable in the § 504 context. In *Marvin H. V. Austin Indep. School Dist.*, 714 F.2d 1348 (5th Cir.1983), the court held in a case brought under the EHA and § 504 that, in the absence of intentional discrimination, an action for damages under § 504 must fail. *Id.* at 1357; *see Scokin v. Texas*, 723 F.2d 432, 441 (5th Cir.1984). A recent Fifth Circuit case, relying on *Marvin H.*, held the dismissal of a § 504 claim for damages proper where the plaintiff failed to allege "that the School Board intended to place his children in inappropriate classes or that his children's placement manifested discrimination animus." *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir.1984) (footnote omitted). In light of our dispositin of the § 504 issue, we have no occasion to determine whether *Guardians* and *Darrone* compel the holdings of *Marvin H.* and its Fifth Circuit progeny.

[9]In *Smith*, the Supreme Court rejected the plaintiffs' claim that the attorney's fees awarded by the district court were justified because they asserted a substantital claim under § 504. The Court reasoned that, in the facts of that case, § 504 added nothing to the substantive rights of the

In their amended complaint, the plaintiffs alleged, in the words of the district court, "the denial of an impartial hearing to determine Lauren's residential placement." *Id.* at 790 n. 4. They did not allege, however, that Lauren was excluded from participation in, denied the benefits of, or subjected to discrimination under a program or activity receiving federal funding. They accordingly failed to allege a violation of § 504. We affirm the district court's dismissal of plaintiffs' § 504 claim.

V. REMAINING ISSUES

The Maneckes assert that the district court erred in applying to this case our decision in *Powell*, 699 F.2d 1078, and the Seventh Circuit's decision in *Anderson*, 658 F.2d 1205. They also argue that the district court exceeded its authority under the EHA when it held, without the benefit of an administrative record, that the Board "did provide Lauren with [a free appropriate public] education." Had the district court not erroneously dismissed the § 1983 claim, it would never have placed itself in the position of trying an EHA

[9]continued
plaintiffs who were claiming a free appropriate public education. To allow the § 504 claim therefore would only frustrate Congress' intent in enacting the EHA: a § 504 plaintiff might circumvent the state administrative procedure established by the EHA, might be awarded damages where none would be available under the EHA, and, if successful, might be awarded attorney's fees. *Smith*, 104 S.Ct. at 3472-73. The Court concluded: "Where § 504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on § 504 for otherwise unavailable damages or...attorney's fees." *Id.* at 3474. *See Irving Indep. School Dist. v. Tatro*, — U.S. —, 104 S.Ct. 3371, 3379, 82 L.Ed.2d 664 (1984) ("§ 504 is inapplicable when relief is available under the [EHA] to remedy a denial of ...educational services.").

The Maneckes contend that *Smith* does not require a dismissal of their § 504 claim because this case presents "a situation where the EHA is not available." *Smith*, 104 S.Ct. at 3474. In light of our holding, we need not rule on this issue.

claim.[10]. We therefore offer only a few brief observations on the last two issues raised by the plaintiffs.

The Maneckes' amended complaint alleged violations of § 504 of the Rehabilitation Act and § 1983. The district court dismissed both claims. Thereafter, a second amended complaint was filed under the EHA. Following a bench trial, the court dismissed the EHA claim. The court relied on *Powell* and *Anderson*. *See supra* note 2.

Both *Powell* and *Anderson* are distinguishable from this case in at least two respects. First, both of those cases antedated the Supreme Court's *Smith* decision. Second, in both *Powell* and *Anderson* the plaintiffs were given the opportunity to use, and in fact did use, the state administrative process. *See Powell*, 699 F.2d at 1080; *Anderson*, 658 F.2d at 1207-08. Therefore, the trial courts, unlike the district court in this case, had before them "aggrieved parties" and "records of administrative proceedings" within the meaning of the EHA.

Further, as we read the EHA, a trial court generally should not decide in a trial on the merits whether or not a handicapped child has received a free appropriate public education under the EHA absent an administrative record of the sort contemplated by 20 U.S.C. § 1415. In the words of the Supreme Court, "the Act permits '[a]ny party aggrieved by the findings and decision' of the *state administrative hearings* 'to bring a civil action' in 'any State court of competent jurisdiction or in a district court of the United States.'" *Rowley*, 458 U.S. at 204, 102 S.Ct. at 3050 (quoting 20 U.S.C. § 1415(e)(2)) (emphasis added). Indeed, in *Rowley* the plaintiffs brought suit "[p]ursuant to the Act's provision for judicial review," *Rowley*, 458 U.S. at 185, 102 S.Ct. at 3040, only after the

[10]The Maneckes cannot be faulted for asserting an EHA violation in their second amended complaint. As we stated in Part IV(a), the district court erred in dismissing the Maneckes' § 1983 claim. That dismissal effectively forced the Maneckes to amend their complaint to allege a violation of the EHA, the only remaining relevant statute arguably entitling them to the relief sought.

decision of a hearing examiner was affirmed on appeal by the state Commissioner of Education. Moreover, the Act requires the reviewing court to *receive the records* of the state administrative proceeding and hear *additional* evidence if requested to do so. 20 U.S.C. § 1415(e)(2). The clear implication of the language in § 1415(e)(2) is that the function of a court under the EHA is, in the usual case, confined to that of *reviewing* administrative proceedings, not determining *in the first instance* the appropriateness of a handicapped child's education. *Cf. Rowley*, 458 U.S. at 206, 102 S.Ct. at 3050 ("due weight" must be accorded state administrative proceedings); *Town of Burlington v. Department of Education*, 736 F.2d 773, 790 (1st Cir.1984) (although the EHA authorizes the trial court to base its decision on the preponderance of the evidence, "the Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial"), *aff'd sub nom. Burlington School Committee v. Department of Education*, — U.S. —, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). When the court has completed its review, it then may grant such relief as it determines is appropriate, including retroactive reimbursement to parents. *See Burlington School Committee*, — U.S. at —, 105 S.Ct. at 2002.

VI. DAMAGES

Given its rulings, the district court never reached the issue of reimbursement. Since a remand of the § 1983 claim is indicated, we make the following observations which the district court should find useful in determining the amount of reimbursement to be ordered, if any is to be ordered at all. We hasten to add that in making these comments, we do not intend to limit the trial court's inquiry on the damages issue.

We are not remanding this case for an entry of judgment for a sum certain. Rather, on remand the district court's task is to determine the damages that flow from the due process violation. Although the record before us has not been developed to any great extent on the damages issue, there are suggestions in it that cause us some concern.

Lauren was enrolled in Devereux from March 21, 1980, until December 31, 1981, when she graduated. The Maneckes seek reimbursement in the amount of $40,000 for tuition paid and related expenses. It seems, however, that Lauren did not begin her academic classes until September, 1980. The Board, in its Proposed Findings of Fact and Conclusions of Law, indictes that Lauren contracted mononucleosis shortly after she began at Devereux and was unable to attend any academic class for March and April of 1980. Record, Vol. 2 at 384. Additionally, during the summer months of that year, Lauren apparently was not enrolled in any academic classes at all. *Id.* Although the parties have not briefed the issue, it seems to us that if these indeed are the facts, the Board may not be obliged under the EHA or any other statute to pay for boarding unaccompanied by academic classes. The district court should address itself to this question.

Perhaps more important is the Maneckes' refusal to agree to a due process hearing after Lauren was removed from Nina Harris and enrolled in Devereux. The Maneckes received a form in July, 1980, which if completed, would serve as a formal request for a due process hearing. The form was not returned to the Board, and a hearing accordingly was not scheduled. Additionally, the Board, in consultation with the counsel for the Maneckes, scheduled a due process hearing for January 26, 1981. The hearing was cancelled at the Maneckes' request. As we view the case, there is serious question that damages, if there were any, ceased accruing when the Board ceased violating the Maneckes' due process rights. If the facts conform to the Board's version, the Board may not be liable for *any* reimbursement.

VII. CONCLUSION

We hold that the district court erred when it dismissed plaintiffs' § 1983 claim alleging a deprivation of due process by virtue of the Board's failure to provide them with a timely impartial due process hearing. Lest our holding be broadly construed, we now emphasize its narrowness. We do not hold that § 1983 may be employed whenever a procedural deprivation occurs in the EHA

context. We simply conclude that, under the facts of the instant case, the plaintiffs properly invoked § 1983. We affirm the district court's dismissal of the § 504 claim, though for reasons not cited by the district court. We further hold that because of the district court's § 1983 ruling, it improvidently addressed the EHA claim. On remand, the district court shall determine what damages, if any, the plaintiffs sustained as a result of the Board's deprivation of their right to due process.

AFFIRMED in part, REVISED in part, and REMANDED for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Richard B. MANECKE, et al.,

v.

SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, a public school district in the state system of public education, Defendant.

No. 81-501-Civ-T-GC.

Dec. 21, 1982.

Gardiner Beckett, St. Petersburg, Fla., for plaintiffs.
B. Edwin Johnson, Clearwater, Fla., for defendant.

MEMORANDUM OF DECISION
GEORGE C. CARR, District Judge.

This cause comes before the Court upon the defendant's motion to dismiss. The plaintiffs, the parents of an adult, mentally handicapped daughter, bring this action for reimbursement of tuition expenditures and other damages. The complaint alleges violations of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (Count I) and 42 U.S.C. § 1983 (Count II). The plaintiffs specifically note that the action is not brought under the Education for All Handicapped Children Act (EAHCA) 20 U.S.C. § 1401 *et seq.*

The plaintiffs' daughter, Lauren, was a day student in the defendant's educational system in 1979. Believing that Lauren would benefit more from a residential educational program, the plaintiffs in December, 1979 requested by letter that the defendant conduct an impartial hearing to determine whether Lauren would

be more appropriately placed in a private residential program.[1] Such a hearing is required by the procedural safeguards contained in the EAHCA.[2]

The defendant responded to the plaintiffs' request with a letter on January 4, 1980 which notified the plaintiffs that the school board's lawyer would arrange for a hearing in the near future. The regulations implementing the EAHCA specify that the school board must make a decision on requests for residential placement within forty-five days of the request for a hearing. Notwithstanding these regulations, the school board did not contact the plaintiffs again until July 21, 1980. In the interim hwoever, the plaintiffs made no attempt to expedite a hearing or re-contact the school board. Instead, on March 27, 1980, the plaintiffs unilaterally and without notice to the defendant withdrew Lauren from her Pinellas County school and enrolled her in a private residential program.

The plaintiffs' first count brought pursuant to 29 U.S.C. § 701 *et seq.* seeks reimbursement of their expenditures for Lauren's tuition. The second count of the complaint seeks damages under 42 U.S.C. § 1983 for the defendant's allegedly willful violation of the plaintiffs' and Lauren's constitutional and statutory rights. As the defendant seeks dismissal of both counts on different theories, the Court will address each of the defendant's contentions in turn.

With regard to Count I of the complaint, the defendant basically avers that the Rehabilitation Act does not privide for pri-

[1]The defendant does not operate a residential school program for the mentally handicapped. The defendant's responsibility under the EAHCA to provide a residential school for students in need of one may be met either in a public facility or a private facility at public expense. *See* 45 C.F.R. § 84.22(c)(3).

[2]It must be emphasized that plaintiff does not bring this action under the EAHCA. For a more detailed discussion of the relationship between the Rehabilitation Act and the EAHCA, *see* note 4 *infra.*

vate damage actions. Furthermore, the defendant argues that even if the Act did provide a remedy, the failure of the plaintiffs to pursue a hearing beyond their initial letter, waives any claim to such damages. Addressing this latter claim, the Court notes that waiver is an affirmative defense and involves factual determinations. Thus, under the strict standard of *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d80 (1957), the defendants waiver argument is an inappropriate basis for a dismissal under Rule 12 Fed.R.Civ.P.

The defendant's argument that private money damages are not recoverable under the Rehabilitation Act presents a more problematic determination for the Court. The Courts confronting the issue have reached conflicting decisions. *See e.g. Miener v. State of Mo.*, 673 F.2d 969 (8th Cir.1982) (Section 504 provides for private damages); *Ruth Anne M. v. Alvin Indep. Sch. Dist.*, 532 F.Supp. 460 (S.D.Tex. 1982) (no damage action under Section 504). The Supreme Court has not ruled on the issue and the Fifth Circuit has expressly resrved judgment. *See Camenisch v. University of Texas*, 616 F.2d 127, 132 n. 10 (5th Cir. 1980), *vacated on other grounds* 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

Those courts who have found a private damage remedy in Section 504 have basically reasoned that where a statute provides a right and that right is infringed, the courts may use any available remedy to make good the wrong. *Miener supra, citing Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). The *Miener* Court concluded that administrative remedies and prospective relief, are of little help to the individual plaintiff and thus ruled that private damages are recoverable for violations of Section 504.

However, this broad power of the federal courts to fashion remedies is limited by the principal that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979). The regulations enforcing Section 504 specifically provide for the termination of federal funds to those institutions which are found guilty of discrimination against the handicapped. 45 C.F.R. § 80.8. Thus, there is an explicit administrative remedy for violations of the

Rehabilitation Act. Although as noted by the *Miener* Court, while this remedy is doubtless of little solace to individual plaintiffs, it does serve the statute's purpose of inhibiting institutionalized discrimination against the handicapped. Furthermore, responding to the lack of an individual remedy, the Fifth and other Circuits have concluded that individuals do have a right to either injunctive or declaratory relief under the Act. *See Camenisch supra.*

Ultimately, the resolution of whether Section 504 provides for private damages is a question of legislative intent. *Cannon v. Univ. of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). Therefore, those Courts which have concluded that Section 504 does not provide for damage relief have supported their decisions with an analysis of Congress' intent in enacting the statute. These Courts note that it would be inconsistent for Congress to have provided for the withdrawal of federal funding while at the same time providing for private damages. *Ruth Anne M. supra* at 473. The purpose of the Act was to promote and expand opportunitites in the public and private sectors for handicapped individuals. *See* 29 U.S.C § 701(8). The Act basically seeks to provide nondiscriminatory treatment and equal opportunity for the handicapped. A private damage remedy would expose recipients of federal funds to a potentially massive financial liability. The risk of litigation may limit the institutional or private acceptance of federal funds and hence actually restrict opportunities for the handicapped. *Loughran v. Flanders*, 470 F.Supp. 110 (D.Conn.1979). Thus, the administrative mechanisms which seek to enforce compliance and promote acceptance of the Act would be at cross purposes with private litigants who seek the award of damages.

However, the legislative history regarding the kinds of remedies that Congress intended to be available under Section 504 is scant. The Courts can basically draw whatever inferences they desire from the cryptic legislative history. *Cf. Gregg B. v. Board of Ed. of Lawrence Sch. Dist.,* 535 F.Supp. 1333 (E.D.N.Y. 1982). in *Gregg*, the Court concluded that nothing in the legislative history of the Rehabilitation Act would suggest that remedies under the Act were to be limited to injunctive and declaratory relief. *Id.* at 1339 (cita-

tions omitted). The *Gregg* Court then noted that Section 504 was modeled after Title VI of the Civil Rights Act of 1964. Title VI bars racial discrimination by the recipients of federal funds and like Section 504 does not expressly provide any remedies except for the termination of funds to those recipients who violate the act. *See Davis v. United Air Lines, Inc.*, 662 F.2d 120 (2d Cir.1981). Thus, as the Second Circuit ruled that private damages are available under Title VI,[3] the *Gregg* Court concluded that private damages are also available under Section 504.

Applying the *Gregg* rationale to the instant case, the Court notes that the Fifth Circuit has determined that there is no private right of damages under Title VI. *Drayden v. Needville Indep. Sch. Dist.*, 642 F.2d 129 (5th Cir.1981). Thus, following *Gregg* and *Drayden*, this Court concludes that there is no private right of damage under Section 504 in this Circuit.

Compelling the Court's decision is its reluctance in the absence of any clear-cut judicial or legislative guidance to create a private right of action under a statute which one Court has termed "simply a prohibition of certain conduct on the part of recipients of federal financial assistance." *Monahan v. State of Neb.*, 687 F.2d 1164 (8th Cir.1982). The Rehabilitation Act is designed to control institutional behavior. Such behavior can be controlled effectively and without the dangers inherent in creating private damage remedies by the existing mechanisms for the enforcement of Section 504 — the withdrawal of federal funds and the right to injunctive and declaratory relief. Consequently, the Court concludes that Section 504 does not provide an action for private damages. Accordingly,

[3] *See Guardians Association of New York City Police Dept., Inc. v. Civil Service Commission of New York*, 633 F.2d 232, (2d Cir. 1980); *cert. granted*, 454 U.S. 1140, 102 S.Ct. 997, 71 L.Ed.2d 291 (1982).

the Court will GRANT the defendant's motion as to Count I.[4]

COUNT II

Besides their claim for tuition reimbursement under the Rehabilitation Act, the plaintiffs seek damages pursuant to 42 U.S.C. § 1983. The Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), broadly stated that an action under Section 1983 exists to enforce all federally created statutory and constitutional rights. However, the Court has been quick to limit *Thiboutot* by holding that where the substantive federal statute provides an exclusive remedy for violations, additional remedies under Section 1983 are not applicable. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). Whether an act contains remedies which are sufficiently comprehensive to preclude Section 1983 actions is a matter of legislative intent. *Middlesex County Sewerage Authority v. National Sea Clammers Ass.*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

[4]Although ruling as a matter of law that private damages are not recoverable under Section 504, the Court notes that it is not clear that the plaintiffs' complaint even alleges an action under the Rehabilitation Act. The gravamen of the plaintiffs' complaint is that lauren was denied placement in a residential facility. Specifically, the complaint alleges the denial of an impartial hearing to determine Lauren's residential placement. However, there are no allegations in the complaint that the defendant failed to evaluate Lauren's educational capacity, that she was denied an education by the defendant or that she was in any way discriminated against because of her handicap.

The plaintiffs bring this claim under the Rehabilitation Act but then extensively cite the EAHCA and its accompanying regulations. However, the Rehabilitation Act and the EAHCA are entirely different statutes with different purposes and procedural requirements. The EAHCA imposes an affirmative duty on the recipients of federal funds to provide a free, appropriate education for handicapped children. *See Board of Ed. v. Rowley*, — U.S. —, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In contrast, the Rehabilitation Act imposes only a negative duty on all recipients of fede3ral funds—the duty not to discriminate. *See Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). *See also Monahan v. State of Neb.*, 687 F.2d 1164 (8th Cir. 1982) (bad faith must be alleged in Section 504 complaints). The Supreme Court in *Davis* suggested

In view of the Court's previous conclusions regarding Congress' intent in enacting Section 504, the issue now before the Court is whether the rights created by Section 504 can be asserted within the remedial framework of Section 1983. The Court has determined that Section 504 only provides for equitable relief to private litigants. To conclude that damage claims are allowable under Section 1983 would circumvent the Court's ruling and the Court's determinations of Congress' intent upon which that ruling is based. Therefore, the Court holds that the plaintiffs can not assert a claim for damage under Section 1983. Accordingly, the defendant's motion as to Count II will be GRANTED. *See Ruth Anne M. supra.*

[4]continued
that any regulation promulgated to enforce Section 504 which required affirmative action on the part of the recipient of federal funds was beyond the authority contained in the Act. 442 U.S. at 411-12, 99 S.Ct. at 2369-70.

In their complaint, the plaintiffs attempt to annex the specific provisions of the EAHCA by noting that a regulation of the Rehabilitation Act provides that certain procedural safeguards deemed to be required by the Rehabilitation Act may be met by complying with the procedures outlined in the EAHCA. 45 C.F.R. § 84.36. However, this regulation is in contravention of *Davis'* holding that Section 504 does not require any affirmative obligations. As such, this regulation is beyond the purview of Section 504.

The plaintiffs endeavor to avoid the exhaustion requirements of the EAHCA by not pleading that statute. The plaintiffs then attack the defendant for not meeting the strict procedural requirements of the EAHCA by arguing that Section 504 requires compliance wit the EAHCA. In this manner the plaintiffs seek the benefits of the EAHCA without having fulfilled its preconditions. However, the plaintiffs can not have it both ways. Those regulations which attempt to require affirmative duties under Section 504, like 45 C.F.R. § 84.36 are invalid. Section 504 simply does not mandate the procedural safeguards that are required by the EAHCA. Thus, while the plaintiffs' complaint may allege a cause of action for failure to provide the process due under the EAHCA, the complaint does not allege discrimination as required under Section 504.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD MANECKE, et al.,
Plaintiffs,

vs.

SCHOOL BOARD OF PINELLAS COUNTY,
Defendant.

MEMORANDUM OF DECISION
Case No. 81-501 Civ-T-13

THIS CAUSE comes before the Court upon the plaintiffs' action under the Education of all Handicapped Children's Act, 20 U.S.C. § 1401 et seq. (EAHCA). Federal jurisdiction is provided by 20 U.S.C. § 1415(e)(2). The Court conducted a two day, nonjury trial in this case on May 16 and 17, 1984.

The plaintiffs, two parents and Lauren, their adult handicapped daughter, are suing the defendant School Board because of the defendant's failure to provide a due process hearing in order to determine the appropriateness of Lauren's educational placement. Such a hearing is required by 45 C.F.R. § 1212.512(a) — one of the regulations implementing the EAHCA.

After Lauren returned home from her stay with the older man, her parents withdrew Lauren from the regular high school and enrolled her in a small private school near her home. Also as a result of the incident Lauren began to see Dr. John Mann, an adolescent psychiatrist. Dr. Mann, as well as Mr. and Mrs. Manecke, testified that in 1979 and 1980 Lauren's presence at home was extremely disruptive. Partially as a consequence of her sexual activities, Lauren's relationship with her mother was very strained and Lauren's relationship with other family members, in particular her younger brother, was tempestuous. Dr. Mann testified that Lauren was keenly aware of her handicaps and resented the normalcy of her brothers. The difficulties in the Manecke household reached such a desperate level that during this period Lauren's younger brother was sent to a private residential school in order to relieve the tension at home.

During the summer of 1979 Lauren attended, at her parents' expense a residential camp for exceptional children in Pennsylvania. While Lauren was away at camp Mrs. Manecke requested that the defendant re-enroll Lauren in the Pinellas County schools but in a special education school, not a regular high school. The defendant acceded to this request and in September 1979 Lauren began attending classes at the Nina Harris School for exceptional children. Based on her emotional and physical records, Lauren was classified as emotionally handicapped and physically impaired. Prior to her attendance at classes in Nina Harris, an individual education program (IEP) was developed with parential consultation for Lauren.

All witnesses with knowledge of the Nina Harris School, including the plaintiffs' witness Dr. Mann, testified that the Nina Harris School was highly regarded in the special education field and offered a variety of individual academic and social programs for exceptional students. Lauren's teachers at Nina Harris testified that she was making adequate academic progress, appeared to be well behaved and participated in a number of extracurricular social activities. Lauren's teachers also testified that Lauren's physical and emotional handicaps were only moderate in severity when compared to other students at the Nina Harris School.

Despite Lauren's apparent adjustment to Nina Harris, the quality of life at the Maneckes' home continued to deteriorate. Lauren fought constantly with her parents, particularly with her mother. Dr. Andriola testified that she advised Lauren's parents to enter into a supportive program of psychotherapy to help resolve the negative emotions engendered by the difficulty of dealing with Lauren. The Maneckes did not enter into such a program.

The Maneckes were considering placing Lauren into a residential program as early as September, 1979. This thought was expressed to the defendant at the IEP meeting prior to Lauren's entry into the Nina Harris School. Through its Director of Admissions for Exceptional Students, Mr. Delp, the defendant complied with the Maneckes' request for information on residential schools.

On December 19, 1979, roughly three months after Lauren's entry into the Nina Harris School, Mrs. Manecke wrote the

defendant's Assistant Superintendent for Exceptional Student Education, Dr. Hinesley. The two page typewritten letter relayed the Maneckes' frustration in dealing with Lauren after her perceived rejection by the man she had run away with. Mrs. Manecke wrote that because of Lauren's emotionally charged behavior, the Maneckes were contemplating placing Lauren in an out-of-state residential facility. Along with the typewritten letter, Mrs. Manecke attached a handwritten note requesting a due process hearing in order to determine Lauren's appropriate educational placement. Mrs. Manecke sent copies of the note and the letter to prominent government figures and the Florida Department of Education.

Dr. Hinesley called Mrs. Manecke concerning the letter and she stated that her motivation behind writing the letter was the failure of the school system to take action concerning a complaint that Lauren's school bus driver had made sexual comments to her. Mrs. Manecke also stated that the bus driver had told Lauren to sit on the floor of the bus so that he could look up her skirt. However, Mrs. Manecke did not, as requested, file a formal complaint against the bus driver. Notwithstanding the absence of a formal complaint, Dr. Hinesley investigated the incident and concluded that Lauren's allegations had no basis in fact.

At trial, Lauren's school bus driver testified that he had never said or done anything to Lauren which could be even possibly construed as sexual in nature. The bus driver had an impeccable ten year record of transporting exceptional students. Lauren's teachers at Nina Harris who knew the bus driver uniformly testified as to his excellent relationship with his charges and his absolute integrity. Lauren's teachers also testified that Lauren had never said anything about the bus incident to them.

Lauren was a sexually precocious young woman who used sex as a means of manipulation. Based on the testimony of the bus driver, the teachers at Nina Harris and the Court's assessment of the credibility of the people involved, the Court shares Dr. Hinesley's conslusion concerning the alleged bus incident. In short, the incident never happened.

Subsequent to his receipt of Mrs. Manecke's letter Dr. Hinesley

sent a copy of the letter and the request for a due process hearing to the school distrct's attorney, Paul Johnson. It was Dr. Hinesley's expectation that Mr. Johnson's office would handle a request for a due process hearing under the EAHCA. However, as the defendant had at that time received only one such request for a EAHCA due process hearing, the defendant did not have a standardized procedure regarding the processing of hearing requests. The one hearing which had been conducted by the defendant was conducted by the defendant's office of special education.

Dr. Hinesley set up a meeting with the Maneckes on February 13, 1980 in an attempt to resolve the bus driver incident. On February 8, 1980 Dr. Hinesley was telephoned by Diane Wells, an administrator with the Florida Commission of Education. Ms. Wells was reacting to the Commissioner's receipt of a copy of Mrs. Manecke's December 19, 1979 letter. Ms. Wells advised Dr. Hinesley to avoid formal procedures and to mediate the dispute in an attempt to arrive at a solution agreeable to all parties.

The Maneckes met with Dr. Hinesley and Mr. Delp on February 13. The Maneckes advised the defendant's representative that Lauren was almost uncontrollable at home and as a consequence, they were seeking residential placement. Dr. Hinesley and Mr. Delp expressed their opinion that Lauren was receiving an appropriate education at Nina Harris. Consequently, as the school board was providing the statutorily required education for Lauren, Dr. Hinesley stated that the great expense of residential placement could not be borne by the school board. However, Dr. Hinesley did not preclude further consideration of the matter.

With regard to Lauren's difficulties with the bus driver, Dr. Hinesley suggested a variety of ways that those difficulties could be alleviated. Included in Dr. Hinesley's suggestions were private transportation to school at the defendant's expense. It became evident however, that the Manecke's chief and perhaps only concern was obtaining residential placement for Lauren. Consequently, they suggested that Dr. Hinesley and Mr. Delp meet with Drs. Andriola and Mann in an effort to substantiate their perceived necessity for Lauren's residential placement.

Dr. Hinesley agreed to such a meeting and on March 12, 1980, the Maneckes, Dr. Andriola, Dr. Mann, Dr. Hinesley and Mr. Delp met. The Maneckes specifically inquired if the meeting was their due process hearing and if they needed their lawyer. Dr. Hinesley stated that their meeting was just an informal attempt to determine how best to resolve the Maneckes' concerns and that it did not qualify as a due process hearing. At the meeting Dr. Mann expressed his opinion that Lauren's acrimonious home life and the possibility of her again running away, made residential placement the most desirable educational setting for her. However, both at the meeting and on the witness stand, Drs. Mann and Andriola stated that Lauren was not physically endangered by either her home life or her schooling at Nina Harris.[1]

In addition, both doctors testified that the defendant could provide and was providing an appropriate education for Lauren at the Nina Harris School.

The meeting ended with Dr. Hinesley promising to continue to provide the Maneckes with information on various residential facilities. However, Dr. Hinesley reasserted the defendant's position that placement of Lauren into a residential facility at the School District's expense could not be justified.

Immediately after the March 12 meeting the Maneckes received a telephone call from the Devereux School for exceptional children in Texas. The Maneckes were told that there was a residential placement opening in the school if lauren was enrolled immediately. The Maneckes accepted the Devereux School's terms. Therefore, without consulting or even informing the defendant, the Maneckes removed Lauren from the Nina Harris School on March 21, 1980 and enrolled her in Devereux.

[1]On March 12, 1980 Dr. Andriola wrote the Devereux School to advise the school of Lauren's medical history. Dr. Andriola stated that Lauren's seizures were under excellent control and had been so controlled for over a year. The letter stated that the only seizures that Lauren exhibited were infrequent periods of staring.

After Lauren's withdrawal from Nina Harris, the defendant considered their responsibility to Lauren to have terminated. However, in July of 1980 the United States Office of Civil Rights acting upon a letter from Mrs. Manecke attempted to mediate an age discrimination complaint brought by Mrs. Manecke on behalf of Lauren against the School Board. Mrs. Manecke alleged that the defendant failed to provide a residential placement for Lauren because of her age. As a result of the mediation, the defendant sent the Maneckes their standardized request form for a due process hearing to determine Lauren's appropriate educational placement. The Maneckes received the form but never filled it out. Consequently, the defendant did not schedule a hearing. The Office of Civil Rights dropped the age discrimination charge in December, 1980 but ordered the defendant to conduct the due process hearing. Therefore, the defendant, upon consultation with the plaintiffs' lawyer, scheduled a due process hearing for January 26, 1981. However, that hearing was cancelled at the Maneckes' request.

Lauren was enrolled in Devereux from March 21, 1980 until December 31, 1981. Her academic progress and social adjustment at Devereux were adequate. However, a comparison of Lauren's academic records and anecdotal social reports at Devereux and Nina Harris reveals that there was no difference between Lauren's academic and social progress at Devereux and her academic and social progress at Nina Harris. Lauren progressed educationally at both schools. However, she also had similar incidents and confrontations with her peers in both Devereux and Nina Harris.

As noted in the Court's Order in this case of October 11, 1983, compensatory damages are available for violations of the EAHCA only under "exceptional circumstances." *See Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983), *citing Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981). The *Anderson* court outlined two exceptional circumstances where compensatory damages may be awarded under the EAHCA — 1) where the defendant has acted in bad faith in "failing to comply with the procedural provisions of section 615 [of the EAHCA] in an egregious fashion," or 2) where the student's health was in danger. 658 F.2d 1214.

Clearly, Lauren's health was not in danger at the Nina Harris School. Aside from the testimony concerning the bus driver incident, the plaintiffs presented no evidence that Lauren had any difficulties, physical or mental, at Nina Harris. Indeed, all of the evidence presented, both from Lauren's doctors and her teachers, indicated that Lauren was benefitting from the special programs at Nina Harris and was a reasonably well-adjusted student. Thus, in the absence of any evidence concerning Lauren's physical endangerment, in order to recover compensatory damages, the plaintiffs must show that the defendant acted in egregious bad faith in denying Lauren her due process hearing.

Lauren did not receive a due process hearing within forty-five days of the Maneckes' request as required by federal regulation. However, all of the evidence indicated that the defendant's professional staff acted honestly and sincerely in attempting to resolve what they knew to be a difficult and frustrating situation for the Maneckes. Because the defendant's procedures for conducting due process hearings were not standardized, Dr. Hinesley's office expected the defendant's legal department to conduct the hearing. However, notwithstanding the defendant's procedural confusion, Dr. Hinesley personally contacted Mrs. Manecke and attempted to resolve what he thought from reading the typewritten letter was her primary concern — Lauren's problems on the school bus. Not only was Dr. Hinesley unfamiliar with the procedures for providing a due process hearing, but he was specifically advised by the State Commissioner of Education's office to mediate the dispute. Dr. Hinesley did so. Dr. Hinesley discussed a number of options to relieve the school bus problem. However, it became evident that Lauren's problems were not educational but interpersonal. Specifically, Lauren and her family could not successfully and benignly interact with each other. Lauren's sexual precociousness was a constant source of irritation and even hostility to her mother.

The mediation process continued through March of 1980. At no time subsequent to their handwritten request for a due process

hearing did the Maneckes reassert that request.[2] All during the medition process the defendant acted in a concerned fashion for both Lauren and her family. However, the defendant was steadfast in its position that Lauren was receiving an appropriate education at the Nina Harris School. While Dr. Mann testified that it was his opinion that Lauren's educational progress would be maximized at a residential program, he also testified that the defendant was providing Lauren an appropriate education.

Reviewing the evidence presented at trial, the conclusion is irrefutable that the defendant's actions in failing to provide a due process hearing do not even approach the "egregious bad faith" standard that is required in order to compensate the plaintiffs for their unilateral, unconsulted withdrawal of Lauren. In making this conclusion the Court is not unsympathetic to the Maneckes' plight at the time of Lauren's enrollment in Devereux. The family was in turmoil. The Maneckes had to be concerned not only with Lauren but with the welfare of their two other children. The great physical care and attention that Lauren required as well as the constant emotional uproar that surrounded her must have monopolized the Maneckes' time to the possible detriment of their other children. The situation became so bad that Lauren's younger brother had to be enrolled in a boarding school so that the quarrels between he and his sister would cease.

[2]In fact, during the summer of 1980, after Lauren had been in Devereux for five months the defendant requested that the plaintiffs complete an application for a due process hearing. The plaintiffs even after a telephone reminder from the defendant did not complete the form. Furthermore, in January, 1981 the plaintiffs cancelled the due process hearing which had been scheduled at the insistence of the Office of Civil Rights.

In view of the chronic and escalating problems caused by Lauren at home, the Maneckes' decision to send Lauren to Devereux was eminently reasonable. However, the simple fact remains that the EAHCA does not guarantee domestic tranquility for families of handicapped children. The EAHCA requires that the defendant provide an appropriate education for Lauren. However, the defendant is not required to maximize Lauren's emotional and social opportunity. Arguably, there are very few children sharing Lauren's handicap who could not benefit from the twenty-four hour-a-day education and attention that is provided by a quality residential school. Certainly there are many physically and emotionally exhausted parents of handicapped children who would welcome the respite of a residential placement. However, the EAHCA ensures a handicapped child's education. It does not ensure either the handicapped student's or her family's emotional well-being.

In conclusion, it is evident that Mr. and Mrs. Manecke have throughout the course of Lauren's life attempted to maximize Lauren's human potential and minimize the effect of her handicaps. Mr. and Mrs. Manecke are good parents and sought only what was best for Lauren and their other children. However, many parents of both handicapped and normal children must confront the difficult realization that there is no legislation, no government program designed to aid them in living with a problem child. In the last twenty-five years our government has made great strides in its provision for the welfare of handicapped children. However, a school system is only required to provide a free appropriate education for a handicapped student. The defendant did provide Lauren with such an education and did not in bad faith deny Lauren a due process hearing. Therefore, the defendant is not required under the EAHCA to reimburse the plaintiffs for their residential placement of Lauren. Accordingly, the plaintiffs' claims will be DENIED and this case will be DISMISSED.

DONE AND ORDERED at Tampa, Florida this 28th day of June, 1984.

GEORGE C. CARR
UNITED STATES DISTRICT JUDGE

One of the Maneckes' claims for compensatory damages is their claim for the recovery of the money which they paid for Lauren's tuition and other expenses at the Devereux School in Victoria, Texas.[1] In addition, with Rule 54 (c) Fed. R. Civ. P., the Maneckes and Lauren are each individually entitled to those damages which naturally and proximately flowed from the denial to them of access to the impartial-due-process-hearing procedure, such as mental anguish or anxiety, frustration, uncertainty, stress, inconvenience and the related sense of affront and injury which attends the denial to a private citizen of his or her statutory rights by a public official charged with the duty to make those rights available to the citizen. See *Carey, supra,* and *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162, 71 S.Ct. 624, 643, 95L.Ed. 817, 848-9 (1951) (Frankfurter, J., right to a "feeling of just treatment" by government officials).

> "Finally, we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by

[1]The record in the lower Court, the briefs of the parties before this Court and the opinion of this Court all appear to refer interchangeably to "tuition reimbursement" and "damages" (See, e.g. *Opinion*, 4251), as though there is no difference between the general remedy of legal damages and the special remedy of equitable restitution ("tuition reimbursement"). Cf. *Edelman v. Jordan*, 415 U.S. 651, 663-8, 94 S.Ct. 1347, —, 39 L.Ed. 2d 662, 673-5 (1974). Compares equitable restitution to damages for Eleventh Amendment purposes). This apparent confusion of the two remedies is not due to a lack of precision or a failure to distinguish between them, but is due to the way in which the case developed under the pleadings. The Maneckes brought Count II of their Amended Complaint under § 1983. Under § 1983 they included their claim for tuition expenses as one part of their claim for general damages. After the Court below dismissed their Amended Complaint and "effectively forced the Maneckes to allege a violation of the EHS [EHA]," *opinion*, 4250, n. 10, they were no longer entitled to seek general damages under § 1983 but

showing the nature and circumstances of the wrong and its effect on the plaintiff."

Carey, 434 U.S. at 263-4, 98 S.Ct. at —, 55 L.Ed. 2d at 265.

[1]continued
were forced to limit their monetary claim under the EHA to recovery of their out-of-pocket tuition expenses and to characterize their monetary claim as one limited to "tuition reimbursement" under the EHA. See *Burlington School Comm. v. Dept of Educ.*, — U.S. —, 105 S.Ct. 1996, 84 L.Ed. 2d —, (1985) (Under certain circumstances parents may recover "tuition reimbursement" under the EHA). Thus the Maneckes have never abandoned their claim for Lauren's tuition expenses at the Devereux School, Victoria, Texas, as one part of their claim for general monetary damages under § 1983 which this Court has now reinstated.

§ 1415. Procedural safeguards.

(a) Establishment and maintenance. Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing. (1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guradian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate eductional unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause

(C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to

this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c) and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have the jurisdiction of actions brought under this subsection without regard to the amount in controversy.